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No. 16-992

IN THE

Supreme Court of the United States

MARISA N. PAVAN, ET AL.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality.

SUMMARY OF ARGUMENT

Under Arkansas law, when a woman married to a man gives birth, the general rule is that her husband must be listed as the second parent on the child's birth certificate, even when he is not the child's biological parent. But when a woman married to another woman gives birth, her spouse may not be listed as the second parent on the child's birth certificate. The Petition for a Writ of Certiorari in this case presents the important question whether such disparate treatment is consistent with the Fourteenth Amendment.

According to the Arkansas Supreme Court, it is, notwithstanding this Court's recent decision in *Ober-*

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

gefell v. Hodges, 135 S. Ct. 2584 (2015). In that court's view, *Obergefell* held only that the Fourteenth Amendment requires that same-sex couples be allowed to marry; it does not require that they be treated the same as opposite-sex couples when it comes to the issuance of birth certificates for their children. This crabbed understanding of this Court's decision in *Obergefell* is plainly wrong, as the Petition explains, and review is appropriate for that reason alone. *See* Pet. 15-25. *Amicus* submits this brief to demonstrate that this understanding of the Court's decision in *Obergefell* is also at odds with the text and history of the Fourteenth Amendment, and this Court's review is warranted for that reason, as well.

Ratified 150 years ago in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality. Erasing the stain of slavery—the ultimate violation of personal liberty—from the Constitution, the Amendment's Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832, 1833 (1866).

Among these personal rights that "cannot be abolished or abridged by State constitutions or laws" is the right to marry. *Id.* at 504; *see id.* (explaining that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home"). Indeed, as this Court recognized in *Obergefell*, "mar-

riage is fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, because of the "abiding connection between marriage and liberty," and the fact that "[c]hoices about marriage shape an individual's destiny." *Id.*; *see Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987).

The Fourteenth Amendment's protection of the fundamental right to marry trumps any contrary state law because it is "the supreme Law of the Land," superior in force to "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. The drafters of our Constitution were acutely aware of legal wrongs state governments committed under the Articles of Confederation, and they wrote the Constitution to impose checks on the power of governing majorities in the states. Chief among those checks was the Supremacy Clause, which makes the Constitution "the supreme Law of the Land," *id.* By including in the Constitution a sweeping declaration of constitutional supremacy, the Framers firmly rejected the notion that federal constitutional guarantees should be left to the democratic process and decided by the people of the states.

This Court should grant review and reverse the decision of the court below because its decision is fundamentally at odds with the Fourteenth Amendment's equal protection guarantee. By treating same-sex married couples differently than opposite-sex married couples, the Arkansas birth certificate laws deny same-sex married couples the "right to participate in the benefits and responsibilities of marriage to the same extent and on equal terms as opposite-sex couples." Pet. 15. In upholding these laws, the court below denied same-sex married couples the full liberty to which they are entitled under the Four-

teenth Amendment, as well as important "benefits that the States have linked to marriage," thereby "impos[ing] stigma and injury of the kind prohibited by our basic charter." *Obergefell*, 135 S. Ct. at 2601, 2602.

Arkansas argues that "[t]he purpose of the [state birth certificate] statutes is to truthfully record the nexus of the biological mother and the biological father to the child," Pet. App. 20a, but that purported purpose is belied by the fact that, in the context of opposite-sex couples, the spouse of the biological mother is, except in narrow circumstances, listed on the birth certificate even if he is *not* the biological parent of the child. Pet. 3. Indeed, Arkansas law "expressly provides that when a married couple uses donor insemination to have a child," as petitioners did here, "the child is 'deemed the legitimate natural child of . . . the woman's husband,' and the husband is the child's legal father." *Id.* at 4 (citing Ark. Code § 9-10-201(a)). To treat same-sex married couples differently "serves to disrespect and subordinate" them, *Obergefell*, 135 S. Ct. at 2604, in defiance of both the Constitution and this Court's precedents. This Court should grant review and reverse the decision of the court below.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO HOLD THAT THE DECISION BELOW VIOLATES THE FOURTEENTH AMENDMENT

A. As this Court Recognized in *Obergefell*, the Fourteenth Amendment Guarantees All Persons an Equal Right To Marry the Person of Their Choice

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. Central to that task was the protection of the full range of personal, individual rights essential to liberty. To achieve these ends, the Framers of Section 1 of the Fourteenth Amendment chose sweeping language specifically intended to protect the full panoply of fundamental rights for all, providing that no State shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

History shows that the Framers of the Fourteenth Amendment wrote Section 1's overlapping guarantees to "forever disable" the states "from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction." Cong. Globe, 39th Cong.,

1st Sess. 2766 (1866). "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.*

The Fourteenth Amendment thus wrote into the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." *Id.* at 1255. In this way, Section 1 gave to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it [gave] to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766; *see* Jack M. Balkin, *Living Originalism* 198 (2011) (explaining that the overlapping guarantees of Section 1 "together . . . were designed to serve the structural goals of equal citizenship and equality before the law").

Erasing the stain of slavery—the ultimate violation of personal liberty—from the Constitution, the Amendment's Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832, 1833 (1866). Among these personal rights is the right to marry. *Id.* at 504 (explaining that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home"); *id.* at 343 ("[T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land[.]"); Speech of Gov. Oliver

Morton at Anderson, Madison Cty., Indiana (Sept. 22, 1866), *in Cincinnati Commercial*, Nov. 23, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 35 (1866) ("We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has."). As this Court has long recognized, "marriage is fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, because of the "abiding connection between marriage and liberty," and the fact that "[c]hoices about marriage shape an individual's destiny." *Id.*; *see Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 384; *Turner*, 482 U.S. at 95.

The Fourteenth Amendment not only protects substantive fundamental rights, it also guarantees to all persons residing in the United States the equal protection of the laws, forbidding a state from enacting a law that discriminatorily denies the right to marry, or the benefits of marriage, to certain groups or classes. The Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," secures the same rights and same protection under the law for all men and women, of any race, whether young or old, native or foreign born, citizen or alien, gay or heterosexual. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.").

As the debates over the Fourteenth Amendment show, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th. Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States[,] and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* The meaning of equal protection was that the "law which operated upon one man shall operate equally upon all," *id.* at 2459 (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502; *see Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,456) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").

Importantly, the Fourteenth Amendment's broad language was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose universal language specifically designed to secure equal rights for all. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 260-61 n.* (1998). Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, at 46, 50, 83 (1914), pre-

ferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), was intended to secure equal rights for all.

The Fourteenth Amendment's Framers crafted this broad guarantee of equality for all persons to bring the Constitution back into line with the fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong.

Globe, 39th Cong., 1st Sess. 2961 (1866), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539.

In short, the Fourteenth Amendment established as constitutional mandates the protection of substantive fundamental rights, including the right to marry, and equality under the law, forbidding the people of a state from denying any group of persons their fundamental rights. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of liberty and equality applies to all who wish to exercise the right to marry, one of the "attributes of a freeman according to the universal understanding of the American people[.]" Cong. Globe, 39th Cong., 1st Sess. 504 (1866). This guarantee necessarily trumps any state law to the contrary, as the next Section discusses.

B. The Fourteenth Amendment and the Supremacy Clause Together Require That the Equal Protection Guarantee Must Be Enforced Against Contrary State Law

The Fourteenth Amendment's guarantees of substantive fundamental rights, including the right to marry, and of the equal protection of the laws "cannot be wrested from any class of citizens or from the citizens of any State by mere legislation," Cong. Globe 39th Cong., 1st Sess. at 1095 (1866), "keep[ing] the States within their orbits" and "keep[ing] whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," *id.* at 1088. The Amendment "declares particularly that no *State* shall do it—a wholesome

and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." *Id.* app. at 256. Like their counterparts at the Founding, the Framers of the Fourteenth Amendment understood that limits on the authority of the states were necessary "to restrict the power of the majority and to protect the rights of the minority." *Id.* at 1095; *cf. The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

At the Founding, the Supremacy Clause, which declares the Constitution to be the "supreme Law of the Land," rendering "any Thing in the Constitution or Laws of any State to the Contrary" null and void and binding "the Judges in every State," U.S. Const., art. VI, cl. 2, established the basic principle that where the Constitution limits state authority, state prerogatives necessarily end, limiting the power of state actors to flout the Constitution. Simply put, the Supremacy Clause makes clear that the people of a state may not adopt a state Constitution, or state laws, that transgress the federal Constitution and that state courts may not "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U.S. 356, 371 (1990). This principle of constitutional supremacy is a "permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18, (1958). As James Madison argued, without a supreme federal power overseeing the states, our system of government would be a "monster, in which the head was under the direction of the members." *The Federalist No. 44, supra*, at 283 (James Madison).

The Framers chose to make this declaration of the Constitution's supremacy exceptionally broad in scope, rendering null and void all forms of state action inconsistent with the Constitution, federal laws, and treaties. As initially introduced by Anti-Federalist Luther Martin, the Supremacy Clause was anemic: Martin's proposal did not establish the Constitution as the supreme law of the land and would have allowed the people of a state to adopt a state constitution that conflicted with the federal Constitution. *See* 2 The Records of the Federal Convention of 1787, at 28-29 (Max Farrand ed., 1911); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1458 (1987) (noting that "when the supremacy clause was first introduced at Philadelphia . . . it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts"). Fortunately, the Framers recognized that such a system of government would have "inver[ted] . . . the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts," *The Federalist No. 44*, *supra*, at 283 (James Madison), and they decisively rejected it. In contrast to Martin's initial proposal, the final form of the Supremacy Clause written into our Founding charter "[i]s continental: one Constitution, one land, one People." Amar, *Of Sovereignty and Federalism*, *supra*, at 1458.

State courts may not refuse to apply this Court's decision in *Obergefell* because they disagree with it. "The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." *Cooper*, 358 U.S. at 19-20. But that is what the Arkansas Supreme

Court did, flouting its obligation to faithfully apply the precedents of this Court. This Court should grant review to enforce the Constitution's supremacy over the state laws at issue here because those laws are at odds with the Fourteenth Amendment, as the next Section discusses.

C. The Decision of the Court Below Is at Odds with the Text and History of the Fourteenth Amendment, as Well as This Court's Precedents

Consistent with the text and history of both the Fourteenth Amendment and the Supremacy Clause, this Court has recognized that the Equal Protection Clause protects minorities from state-sponsored discrimination at the hands of majorities, "withdraw[ing] from Government the power to degrade or demean" through the democratic process. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Likewise, this Court has recognized that states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society" or "make them unequal to everyone else." *Romer v. Evans*, 517 U.S. 620, 631, 635 (1996).

In *Obergefell*, this Court followed these principles to their logical conclusion, holding that "the right to marry is a fundamental right inherent in the liberty of the person." 135 S. Ct. at 2604. Thus, "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* In so holding, this Court recognized that "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order." *Id.* at 2601. Thus, "by virtue of their exclusion from that institution, same-sex couples are denied the con-

stellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." *Id.* at 2601; *see id.* (describing "birth and death certificates" as "aspects of marital status"); *id.* at 2600 (noting that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education").

The court below lost sight of these foundational equal protection principles, empowering the people of a state to "disparage and to injure" loving, committed same-sex couples, "whose moral and sexual choices the Constitution protects," *Windsor*, 133 S. Ct. at 2696, 2694, and denigrating their marriage to "second-tier" status, *id.* at 2694; *see Obergefell*, 135 S. Ct. at 2600-01. That contravenes *Obergefell*. While the people of a state may, through their state legislatures, create laws in the mine run of cases, *Obergefell* makes clear that they cannot contravene the Fourteenth Amendment's guarantee of equality of rights under the law, denying same-sex couples the same benefits associated with marriage provided to opposite-sex couples.

According to the court below, there is no tension between the Arkansas birth certificate statutes and the Fourteenth Amendment because the "purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child." Pet. App. 20a; *id.* at 21a ("It does not violate equal protection to acknowledge basic biological truths."). But the laws provide that, in the context of opposite-sex couples, the spouse of the biological mother should generally be listed on his child's birth certificate even if he is *not* the biological parent of the

child. Pet. 3; *see* Pet. App. 45a (Danielson, J., dissenting) (concluding that the state birth certificate statutes focus on "marital" relationships, not "biological relationships," and "[t]he obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist").

In fact, Arkansas law "expressly provides that when a married couple uses donor insemination to have a child," as petitioners did here, "the child is 'deemed the legitimate natural child of . . . the woman's husband,' and the husband is the child's legal father." Pet. 4 (citing Ark. Code § 9-10-201(a)). Thus, the state's purported rationale provides no basis for denying petitioners here the right to have both parents listed on their children's birth certificates when similarly situated individuals in opposite-sex marriages would be so listed as a matter of course. The state's laws that abridge that right violate the Fourteenth Amendment, denying same-sex married couples the full constellation of benefits associated with marriage under state law and treating them differently than similarly situated opposite-sex married couples.

Significantly, if lower courts can deny same-sex couples the same benefits of marriage accorded to opposite-sex couples on so flimsy a rationale as the one offered here, it would permit lower courts to, in effect, disregard this Court's decision in *Obergefell* merely because they disagree with it. Indeed, as the Petition argues, allowing the decision here "to stand would open the door for other courts to pursue a similarly blatant path of denying same-sex couples important marital rights and protections based on equally specious grounds . . . . This Court should grant review to foreclose that destabilizing path." Pet. 25.

This Court should not countenance the decision of the court below to violate this Court's precedents and "impose stigma and injury of the kind prohibited by our basic charter." *Obergefell*, 135 S. Ct. at 2602. This Court should grant review and hold that the decision below violates the Constitution's equal protection guarantee.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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